SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 11, Original.

STATE OF LOUISIANA, COMPLAINANT,

vs.

STATE OF MISSISSIPPI, DEFENDANT.

IN EQUITY.

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF LOUISIANA IN SUPPORT OF HER BILL OF COMPLAINT.

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Supplemental Brief on Behalf of the State of Louisiana in Support of Her Bill of Complaint.

At the time of the preparation of our original brief in this case, we did not have before us the two briefs which have since been filed by the counsel of Mississippi, one by the attorney general and assistant attorney general of Mississippi, and the other by the associate counsel, Messrs. Monroe McClurg and Hannis Taylor. We, therefore, as counsel on behalf of Louisiana, were ignorant of what defenses would be set up by, and for, the State of Mississippi, except in so far as they had been developed by the answer and cross-bill of that State, and also by what had been indicated during the taking of the testimony, and offering of evidence.

We were therefore surprised, on the perusal of their briefs, at the fact that the State of Mississippi had now shifted its

defenses to far different grounds from those which it had originally assumed; indeed to grounds which were not only inconsistent with the original positions taken by Mississippi, but in direct contradiction of, and in opposition to, their whole previous theory of the case.

I.

This change of base by the State of Mississippi, heretofore referred to, is illustrated by her treatment of the evidence introduced in this case. In the twentieth paragraph of her *answer* (Record, page 81) the State of Mississippi contends that "except as to a small portion of *Isle à Pitre* in the whole expanse of this territory there is not a single human habitation, nor is there any animal life thereon, nor can any such be thereon. That it is a low-lying archipelago of irregular islands sometimes entirely covered by the high tide and at all times soft and boggy and to walk upon them is at almost all times impracticable and no actual occupancy of any kind has ever been had of the said territory except the boats of the fishermen, etc."

In our brief we called the attention of the court to the fact that this territory, composing the peninsula of Saint Bernard, and the Louisiana marshes, is of alluvial origin, and has never been higher than the surface of the highest water which by the deposit of its suspended alluvion had made the peninsula, and therefore is, necessarily, at about tide level; and an abundance of evidence has been introduced in the record showing that the character of the country conforms to its general recognized name of *marshes*. There are some few habitations of Louisianans engaged in the oyster industry who have built houses in the marsh, but that the area is not susceptible of cultivation and is at tide level, except the coast line, extending from Malheureux point on the west to Isle à Pitre on the east, forming the coast line of the State of Louisiana. The testimony of George Thiel and

Adolph Monier was introduced by the State of Louisiana for the purpose of showing that there has always existed, and that there exists today, a distinct and well defined coast line between these two points, forming the south boundary of Mississippi sound, and that this well defined and distinct coast line, higher than the balance of the Louisiana marshes, constitutes a part of the coast line of the State of Louisiana, as contemplated by the Congress of the United States when erecting Louisiana into a State, and yet we find counsel for Mississippi now quoting this very evidence to establish a character to the whole Louisiana marsh entirely different from, and at variance with, the character of the country as claimed by them in their answer to the bill of complaint and contrary to the true facts; this change of base being apparently assumed for the purpose of endeavoring to impress the court with the island character of the *marsh hummocks* composing the Louisiana marshes, forming a part of the parish of Saint Bernard and the peninsula of that name (Record, pages 324-330, testimony of Alfred Joseph Monier, and, pages 330-332, of George Thiel).

II.

Associate counsel for the State of Mississippi, in their brief, have extracted from the testimony of Dr. William C. Stubbs, State geologist of the State of Louisiana, on the subject of the geological origin of the peninsula of Saint Bernard and the Louisiana marshes, and have attempted by *garbling* that testimony, to now make it appear that Dr. Stubbs said that the territory composing the disputed area in the parish of Saint Bernard was made up of islands which had been built by the winds and waves of the sea, instead of by alluvium deposited by the Mississippi river, through Bayous Terre aux Bœufs and La Loutre, and that the insular formation of certain portions of the Louisiana marshes, (or islands, so-called by Mississippi), has never formed part

of the peninsula of Saint Bernard but were distinct creations formed by the winds and waves of the sea, and not by alluvium. We will proceed to show that the whole of Dr. Stubbs' testimony on this point is directly to the contrary.

Dr. Stubbs' testimony appears in the record at pages 332 to 355. He testified that the whole of the territory forming the parish of Saint Bernard was built up by the deposit of alluvium brought down by the Mississippi river, through the bayous which we have just mentioned. On page 334 he says, in reference to these two bayous:

"All the marsh lands that we now have along the banks of the Bayou Terre aux Bœuf that are being cultivated came from the deposit of this stream or bayou that ran through that country, and in fact the whole of Saint Bernard parish has been built up by that agency, the bayous coming from the Mississippi river."

By further reference to Dr. Stubbs' testimony, it will be seen that he has identified sample No. 1 as a sample of soil taken from Isle à Pitre and characteristic of the entire alluvial formation of that area; he has also identified sample No. 2 as characteristic of the chain of sand islands, forming the southern limits of Mississippi sound, lying south of the State of Mississippi, and east of the parish of Saint Bernard and the territory in dispute. It will thus be seen that Dr. Stubbs has thus far plainly established that the parish of Saint Bernard consists of alluvial deposits and not of sand washed up by the winds and waves of the sea. Having thus testified in regard to the formation of the peninsula of Saint Bernard, he then goes on to testify in regard to the sea-sand islands, east of Saint Bernard, not in dispute in this case, and south of the Mississippi coast; and he refers at length (Record, bottom of page 338) to islands south of Louisiana, on around to Texas and Mexico, as being of sea-sand formation, created by the waves of the sea, and similar to the string of islands lying south of the coast of Mississippi and east of the parish of Saint Bernard.

Vhen Dr. Stubbs, therefore, used the expression (Record, , 345): "These on the coast of Louisiana have not been off; they have been formed by the waves and winds of Gulf," he referred to the sand islands, south of Louisiana, lar in character to those south of the State of Mississippi, to islands that form no part of the parish of Saint Ber- d, and no part of the disputed area. Yet associate coun- or Mississippi have endeavored, in their brief (pages 33, 35, and 49), to make it appear that Dr. Stubbs referred ie disputed area in the parish of Saint Bernard, as being nds which had "not been cut off," and as having been rmed by the waves and winds of the Gulf."

s showing the correctness of our contention in this re- t and as clearly showing the garbling of this evidence, vill take up and consider the testimony of Dr. Stubbs n the point where he was taken in hand on cross-ex- nation by Mr. Taylor, one of the associate counsel of the e of Mississippi (Record, page 344):

Cross-examination by Mr. TAYLOR:

Q. You are familiar, are you not, with the geography of archipelago of islands lying off the east coast of Saint nard parish and the south coast of Mississippi?

A. Yes, sir.

Q. Is it not a fact that in many portions of the world, n many coasts, there are archipelagoes of islands; is not one of the common features in geography and not un- l feature, the archipelago of islands along the coast? for nce such an archipelago that lies off the coast of Alaska. you familiar with that?

A. Not very much there, but I know what you mean.

Q. It is a very simple phenomenon of history, that there archipelago of islands lying off the coast?

A. I will answer by stating I have already said that e are just such a string of islands lying from the mouth ie Mississippi river around to Mexico."

will be here noted that Dr. Stubbs at this point refers is testimony (bottom of page 338) where he speaks of

the sea-sand islands west of the Mississippi river, along the Louisiana coast, and along the Texas coast down to Mexico. Mr. Taylor then follows with the next question.

"Q. And is it not a fact that there is an archipelago of islands along the coast of Cuba known as the——"

It is to be noted at this point that Dr. Stubbs had, at the top of page 338, discussed the formation of the peninsula of Florida and the island of Cuba, and had designated them as of alluvial formation, built up by the Gulf stream. It will be noted also that the reference to Cuba would provoke a discussion of islands of *alluvial* formation as contradistinguished from islands of *sea-sand* formation. Therefore, Dr. Stubbs, in answer to this last question of Mr. Taylor, concluding that Mr. Taylor had theretofore been speaking of islands of sea-sand formation and was then changing to another subject, said, when interrogated in regard to the island of Cuba:

"A. You have gone into another thing."

Mr. Taylor thereupon stated to the witness:

"Q. You can just omit that"—

indicating that he did not intend to discuss islands of alluvial formation, and that he was referring to the islands of sea-sand formation, forming the southern boundary of Mississippi sound and east of the disputed territory, upon which Dr. Stubbs understood Mr. Taylor had been examining him, as shown by his original question.

Following up the same line of thought that he had in mind, that Mr. Taylor, by reference to Cuba, intended to change from a discussion of sea-sand islands to alluvial islands, Dr. Stubbs then answered, when told to omit the discussion:

"A. These are all alluvum origin"—

erring to Cuba and Florida. Thereupon Mr. Taylor said:

Q. We won't go into that"—

icating that he did not want to discuss islands of alluvial nation, and followed this remark, with the remaining part he question:

But that is a very common phenomenon in the geog- hy of the world, an archipelago or string of islands lying the coast?"

o which Dr. Stubbs replied.

A. Yes, sir."

hereupon Mr. Taylor asked the question:

Q. Is it not a very familiar matter in the study of geol-, the causes by which these archipelagoes are formed; process by which islands have been cut off from the nland?"

r. Stubbs thereupon replied to this question, considering concluding, as instructed by Mr. Taylor, that he should discuss islands of *alluvial* formation but should confine answer entirely to islands of *sea-sand* formation, as fol-s:

A. Sometimes, and at others not. These on the coast of isiana have not been cut off; they have been formed by waves and winds of the Gulf."

r. Stubbs, there intending in his reference to the coast ouisiana, the islands lying south of Louisiana, and west he Mississippi river, which he had mentioned at the top age 345, in answer to a previous question, which islands, e had previously stated, were of the same sea-sand and e formation as those like Cat island, Horn island, Ship nd, Petit Bois, and Dauphin islands, making up the n of islands, forming the southern boundary of Missis-

sippi sound and lying immediately eastward of the parish of Saint Bernard.

It will thus be seen that there is a studied attempt, on the part of associate counsel for Mississippi, to apply the testimony of Dr. Stubbs, in regard to the sand islands to the eastward of the peninsula of Saint Bernard, to the hummocks of land forming part of the peninsula of Saint Bernard, when it is perfectly evident that his testimony was directly to the contrary, in testifying that the parish of Saint Bernard was composed entirely of alluvium and not of sand created by the waves and winds of the sea.

III.

Associate counsel for Mississippi, in reference to the testimony of Major B. M. Harrod (Brief, pages 35, 36), laid great stress upon his statement that the peninsula of Saint Bernard was, at no time, a solid peninsula, but that spaces of water, or lakes, had been left in process of geological formation by alluvium, and that these water spaces had been subsequently enlarged by subsidence. It has never been the contention of the State of Louisiana that the peninsula of Saint Bernard was of an absolutely solid land formation, free and devoid of any water spaces, because that would be contrary to the very geological theory of its creation, which required water spaces through which the sediment would be carried, that would be used in the building up of the peninsula. It is therefore to be naturally supposed, as stated by Major Harrod, that there would be water spaces and lakes throughout the area, but that fact would not necessarily affect its general original peninsular formation as contended for by the State of Louisiana, just as the presence of the everglades in the Florida peninsula would not make the Florida peninsula any less a peninsula. The contention of the State of Louisiana is: that the coast line extending from Malheureux point to Isle à Pitre,

is and always has been a distinct coast line; that it is a natural extension of the peninsula of Saint Bernard, and has always existed and today still exists as a distinct coast line, though the peninsular formation, south of that coast line, has been more or less broken up, by the effect of subsidence, and the meteorological causes discussed in the Louisiana brief and set forth fully in the record. But that despite all of this process of continuing disintegration, the peninsula was more distinct as such one hundred years ago and that Congress regarded the peninsula of Saint Bernard, at the time, as a peninsula, and the coast line, between the points heretofore mentioned, as being part of the coast of the State of Louisiana, and the line from which the three-league distance was to be calculated, in determining what islands belonged to that State.

In the brief filed by the attorney general and assistant attorney general of the State of Mississippi, the fact of subsidence and disintegration in the Saint Bernard peninsula, which has been so clearly demonstrated by the evidence in the record, and by careful arithmetical calculations and investigations conducted by the engineering department of the United States Government, has been ridiculed and the statement has been made on page 41 of their brief that:

"If it has subsided four feet a century it must of necessity have stood up originally some forty feet above the sea level."

This deduction of the attorney general of Mississippi is an absurdity on its face, because of the fact that the alluvium, with which this peninsula was built up, was necessarily carried there by the waters of the Bayous Terre aux Bœufs and La Loutre, as long as there were no levees in existence, and these streams were connected with the Mississippi river, and the lands formed could never be higher than the surface level of the waters which made these lands by the deposit of their suspended alluvium. We have shown how the subsidence naturally occurred through the loose

nature of the matter deposited by its own weight, and that this subsidence was annually compensated by the sediment brought with each overflow of high water of the Mississippi river, and that these lands were therefore kept at about tide level so long as there were no levees; and that when the levee system was built in the year 1750 and the compensation by deposit ceased, then the only compensating element was the decay of vegetation which, in turn, offset the subsidence and has kept those lands at about tide level, where they were able to maintain themselves above the surface of the water, and at no time has there been, except on the line extending from Malheureux point to Isle à Pitre, any great elevation above the surface level of the water.

IV.

The burden of the complaint in both briefs, filed by the State of Mississippi, is along the line of suggesting to the court that it would be a great injustice to the State of Mississippi if the area in dispute were given to the State of Louisiana, because it would seriously affect the commerce of the State of Mississippi, and reduce her sea front. An examination of the map will show that the sea front of the State of Mississippi is not reduced one foot by the adoption of the line contended for by the State of Louisiana, although Mississippi complains that her sea front would be reduced one-half or two-thirds and thereby her whole commerce along that Gulf coast interfered with. As a matter of fact, the awarding of this territory to Louisiana would not affect the commerce of the State of Mississippi in the slightest degree, because these waters of Mississippi sound are navigable waters and Mississippi vessels would continue to navigate them, but would be prohibited only from taking oysters from the territory claimed by Louisiana, so that the question reduces itself merely to a matter of determining to which State shall be given an area that is valuable alone because of its

ster-producing properties and as having no effect upon e commerce or the sea front of the State of Mississippi.

V.

DEEDS OF THE LAKE BORGNE BASIN LEVEE BOARD.

It is passing strange that the associate counsel for Mississpi should hark back to the cold trail of a matter which is distinctly explained and exploded in the testimony in e record. On page 72 of their brief, speaking of certain eds granted by the Lake Borgne Basin Levee District comssioners, to private individuals, of land in the disputed ea, they call particular attention to the clause in these eds as follows:

"And further that should the said title be subsequently clared void the said board shall not reimburse to the purser any sum whatever" (Record, page 1088, document . 59).

And the associate counsel add:

"A more emphatic declaration could hardly have been ade of the flimsiness of the pretended claim of complainant der the act in question."

And on page 75 counsel again say:

"This aspect of the case is not worthy of serious consideran save so far as it goes to show that the authorities of uisiana, by seeking to acquire color of title to the islands question, by an appeal to the swamp and overflowed land s were convinced that that State possessed no title to them, der the act of April 6, 1812, admitting her into the nion."

The attempt is here made to show that the levee board, agent of the State, was doubtful of its own title, and the ior title of the State, to those very lands. The transparent lacy of this contention becomes perfectly evident when

we refer to the record on this point. In connection with the testimony of Mr. W. K. M. Dukate, one of these deeds from the levee board was offered in evidence, and on page 386 of the record (bottom) associate counsel for Mississippi asked:

"Q. I noticed from your deed that you bought two sections of land, sections 26 and section 21, and also four islands for which the State of Louisiana gave you a quitclaim; did it expressly provide that she did not warrant the title to the land, and for all of which you paid $63.75. That is correct.

"A. I believe in the main it is."

It was intimated that the levee board was unwilling to warrant the title to the land because of a defective title, or because it was thought that the State of Mississippi might have some claim or title to these lands. It therefore became necessary to account for and explain the want of warranty in these deeds by the levee board, when as a matter of fact, the State of Louisiana had, between the years 1853 and 1894, issued thirty separate patents to land in the disputed area to private individuals, without the exclusion of warranty in the several patents. On page 781, Mr. John Dymond, Jr., who was placed upon the stand and sworn as a witness, testified as follows:

"A. I am attorney of the Oyster Commission of Louisiana and also of the board of commissioners for the Lake Borgne Levee Basin district. I am attorney for several other levee districts in the parish of Plaquemines, and if you desire me to give them in detail I will be glad to do so.

"Q. It has been noticed that in these deeds from the Lake Borgne Basin Levee district—that is the proper name, is it not?

"A. Board of commissioners for the Lake Borgne Basin Levee district.

"Q. That there is an exclusion of warranty in these deeds. Will you please state how that exclusion came to be placed and for what reason, in these various deeds?

"A. When the board of commissioners for the Lake Borgne Basin Levee district was created, under section 11 of

t 14 of 1892, authorizing the creation of that levee district take charge of the protection of the parish of Saint Bernard, and a portion of the parish of Plaquemines, from overw by the high waters of the Mississippi river, the legislare authorized the register of the State land office to transfer that levee board all unsold State lands that were within e territorial limits of that district. For the purpose of ising funds with which to construct levees, in carrying out e objects and purposes of the act, I was consulted *as* (by) e board as its attorney, as to whether or not there should any warranty clause put in these deeds and I advised the ard not to put any warranty clause in the deeds because, as department of the State government, the board was not in a sition to warrant its deeds to these lands, as the proceeds of e of these lands were used in constructing levees and were erefore converted into other form which would not be available or on hand, for meeting any warranty obligations of a ntract of sale, and that any purchaser would have relief by plying to the legislature, in case there was any difficulty to warranty, and it would be the safest plan and would less likely to embarrass the board if that policy was proded with and the board acted on my advice."

And again on page 783 the same witness said:

"Q. In the preparations of these acts of sale from the Lake rgne Levee board, or, rather the board of commissioners the Lake Borgne Basin Levee district, was the idea upperst in your mind, or did you consider it at all, at the time, excluding warranty, that the State of Louisiana had a initive (*defective*) title to this property?

A. No, sir. No, sir. As the attorney of the board I conered that the State of Louisiana had a perfect title to the perty, and the idea of there being any uncertainty in the e never at any time affected me in my conclusions or in advice.

Q. Then, it was an entirely different reason that you d than any defect in the title of the State or of the levee rd holding from the State, that prompted you in giving advice you did?

A. Yes, sir."

On cross-examination in regard to this very same matter, the same witness testified on page 783:

"Q. Does the act of the legislature to which you refer limit the title to a release; does it prohibit a warranty being given to these lands?

"A. No, sir. It vests full authority in the levee board to determine the price and conditions under which the land shall be sold.

"Q. It does not undertake to say whether it shall warrant the title or not?

"A. No, sir.

"Q. And that act was passed when?

"A. In 1892; it was act 14 of the legislature of the State of Louisiana for that year.

"Q. Of course that was before there was any suspicion of this controversy?

"A. Yes, sir."

As stated by Mr. Dymond, in his testimony upon this subject, it is evident that he felt that, in the event it should subsequently develop that the State of Louisiana, before its transfer of these lands to that levee board, had previously patented any of the lands to individuals, or if the United States Government had, prior to the swamp-land grants of 1849–1850, patented any of these lands to private individuals, then the Lake Borgne Basin Levee board would not be in a position to warrant the deeds, or to reimburse the money received, because the said funds, after being covered into the State treasury, would have been used for the purpose of building the levees of the district, under the terms of the swamp-land grants, and such funds would not then be available for any purpose of warranty or reimbursement.

VI.

Outside of these attempts to twist and correct the evidence, so as to endeavor to maintain a weak case, the counsel for Mississippi have, in our opinion, advanced several proposi-

ions of mingled law and fact which we believe to be utterly untenable.

In our original brief on page 45 we quoted authorities upon the maxim "*Qui prior est in tempore potior in jure*," authorities to show that the maxim would apply to Louisiana's title to the peninsula of Saint Bernard and the islands, in dispute here, because she acquired them under the act admitting her into the Union on April 6, 1812, and the claim of Mississippi did not originate until December 10, 1817, nearly six years afterwards. We now add to the authorities here cited the following: In the Opinions of the Attorneys General, volume IX, page 254, on a question submitted as to certain swamp and overflowed lands surveyed, selected, and granted to the State of Arkansas by the act of Congress, September 28, 1850, we find the following:

"On the 9th of February, 1853, Congress made another grant to the States of Arkansas and Missouri to aid in the construction of a railroad, and under this grant a part of the land previously granted to the State of Arkansas under the denomination of swamp lands, was included, and is now claimed by the railroad. The question upon which you ask my advice requires a comparison of two laws and the acts done under them so as to ascertain which of these is the better title. Does the State take it under the first grant or was that grant so imperfect that the subsequent disposition of it by Congress passes the right to the later grantee? Where there is a conflict between two titles derived from the same source, either of which would be good if the other were out of the way, the elder must always prevail; *prior tempore est potior in jure*.

"This difficulty, therefore (*is*), solved, if the mere grant, as you call it, gave the State a right to the land from the day of its date. That it did so there can be no doubt. * * * The subsequent grants by Congress to the State for the use of the railroad could not have been intended to take away from the State the rights previously vested in her for other purposes. * * * The State, therefore, has the oldest and the most definite title and its lands were accurately located and their boundaries particularly defined agreeably to the act of

Congress before the same thing was done by the other claimants. The oldest title, the most definite, and the first location will surely give her priority and preference over another grantee subsequent in title, less definite in the terms of the grant and later in location."

Attorney General J. S. Black to Hon. Jacob Thompson, Secretary of the Interior, November 10, 1858.

An ingenious attempt has been made by the counsel for the State of Mississippi to do away with the priority of the grant of this territory to Louisiana before that to Mississippi, by building up a theory that Congress had in view a division of the coast along the gulf of Mexico so as to equalize the water frontage of Alabama, Mississippi, and Louisiana. In order to carry out this theory, reference is made to the southern boundary line of Mississippi, as fixed in the act of December 10, 1817, and the act of March 2, 1819, fixing the southern boundary line of the State of Alabama, in both of which acts islands within six leagues of the shore were granted. The effort is then made to construe these two later acts with the act admitting Louisiana, and to evolve an intention of Congress to limit and control the boundary of Louisiana by the subsequent acts. This is attempted to be done by applying the principle that acts *in paria materi* are to be construed and interpreted together, as expressing the true intent of the law-making power. We do not dispute the proposition that, in the proper interpretation and construction of a law, the intention of the law-maker should be arrived at when there is any obscurity or ambiguity in the letter of the law. This is a maxim of the civil as well as a principle of the common law: "*Scire leges non hoc est verba earum tenere, sed vim ac potestatem*," or, as rendered by Coke-Littleton, 78, "The intendment of law; the true meaning, the correct understanding or intention of the law; a presumption or inference made by the court." In this cause we firmly insist that the principle has no application to the act admitting Louisiana into the Union, because the acts

admitting Mississippi and Louisiana into the Union are not on the same subject-matter, and are therefore not statutes *in pari materia*, because they relate to two entirely different States and two entirely different objects.

"Statutes are *in pari materia* which relate to the same person or thing or to the same class of persons or things, and the phrase is applicable to public statutes or general laws made *at different times and in reference to the same subject. The word 'par' is not to be confounded with the term 'similis;' it is used in opposition to it, as in the expression 'magis pares sunt quam similes,' implying not likeness merely but identity.*"
English and American Encyclopedia of Law, second edition, vol. 26, pp. 621–22. (Italics are our own.)

"*Where Meaning Clear Resort to Other Statutes Generally Improper.*

"*It has been said that the doctrine that statutes in pari materia are to be taken together and construed as one act is resorted to only in cases of doubt, and it is never applicable where a statute is plain and unambiguous;* but clearly this statement is too sweeping, for a resort to other statutes may be necessary to determine the legislative intent in case of a repugnancy between the statutes, or may be used to strengthen conclusions founded on the language of the statutes" (*ibid.*, 623).

Now there is no other statute resorted to in the attempt to explain the repugnancy between the two acts of Congress in regard to the boundaries of Louisiana and Mississippi. The doctrine held in the text that the word "*par* must not be confounded with the term *similis*. It is used in opposition to it as in the expression '*magis pares sunt quam similes*,' intimating not likeness merely, but identity. It is a phrase applicable to general laws or public statutes made at different times in reference to the same subject," is taken from 9 Conn., p. 469, in a case where it was sought to maintain the right of subscribers to stock to withdraw their subscriptions and moneys, after six months' notice, from a particular bank (the Eagle) when there was no such

proviso or clause in its charter, because in the charters of other banks there was such a proviso and clause, and it was argued that the charters of all the banks of the State were *in pari materia*. So in 45 Ala., 535, it was said, quoting from Smith's Comm., page 751, section 636:

"It has been justly said that an argument drawn from a mere similitude of words which are used in relation to a subject entirely different would be a sophism too palpable to need serious reply (7 How., 122, 494)."

In 9th Barb. (N. Y.), 169, the Connecticut case was quoted and the doctrine endorsed, as also 1st Kent, 463, and Lord Mansfield in 1st Douglass, 30, both of which are cited by our opponents in their brief on the subject of "*in pari materia*," but the case only applies the doctrine to "a code of statutes relating to one subject, was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions (1 Kent's Comm., 463–464; Smith's Comm., 639)." The same application is made in 59 Barb., 202, in regard to wills and testaments. The court said:

"The design is to carry out the intentions of the laws, and it is a rule that a code of statutes relating to one subject was intended by the legislature to be consistent and harmonious in all its parts and provisions."

So in 7 How. Prac., N. Y., 245, the court said, referring to the Connecticut case:

"Possibly the learned chief justice was a little inaccurate in saying that the word '*par*' denoted identity, but the legal maxim uses it in that sense, and it must be applied accordingly. Now, are the subjects of the two enactments which I am considering identical?"

and decided that they were not. So in 59 Vt., 46, the same doctrine was maintained.

By referring back to the opinion of Attorney General Black, from which we have already quoted, it will be seen

hat in that case where there were two grants from the Jnited States, both of which covered a portion of the terri-ory or swamp lands in dispute, instead of holding that the ater statute would modify or control the earlier grant, At-orney General Black sustained the doctrine that the earlier grant would not be interfered with by the later grant, and such s the case in the cause at bar. The truth to our mind is that his theory of *pari materia* is a mere pretext by which an at-empt is made to reconcile two seemingly conflicting acts of Congress, when the true conclusion to be drawn would seem o be that Congress overlooked the prior grant to Louisiana vhen she made the southern boundary of Mississippi in con-lict with the prior grant. And this ignorance and oversight, f it be such, is not to be wondered at when we consider that a large portion of the Louisiana territory, acquired in 1803, vas almost *terra incognita* to the balance of the people in the Jnited States, having been so recently acquired and being o remote from the National Capital, as well as from the ther States of the Union, for we must bear in mind that, t the time Louisiana and Mississippi were admitted into he Union, steam navigation, on either inland rivers or on ea, was practically unknown, and these districts of our ountry could only be reached by weeks or even months of ravel. Besides this, when Louisiana was admitted into the Jnion by the act of April 6, 1812, the territory, now com-osing the coast counties of Mississippi, that is, below the 31st degree of north latitude, was not a part of the Mississippi erritory, but was in dispute between the United States and Spain, and therefore, when Congress admitted Louisiana into he Union, it could have had no prospective idea that the oundaries fixed for Louisiana could in any way interfere with any future legislation on the admission of new States. The theory, therefore, of any preconcerted design in regard o the water front of Mississippi, when Louisiana was ad-nitted, is entirely unfounded, without any basis and is ntterly fallacious.

VII.

In our former brief the deep-water channel theory was discussed by us only as an alternative, or confirmatory of what we had already said in regard to the boundary of Louisiana, as laid down in the act of Congress. We contended that the principle of the *thalweg* would apply to the arms of the sea, gulfs, sounds, bays, and other similar waters lying between two nations or States and quoted from the various authorities on the subject. In the brief of the associate counsel for Mississippi the point is attempted to be made that this *thalweg* or deep-channel theory is only applicable to interior rivers and is not applicable to sea waters whether of the open sea or arms of the sea. In the quotations which we made from the various authorities on international law, we showed that the reason of the adoption of the *thalweg*, or deep-water theory, to interior rivers was that it was deemed equitable and just that each of the riparian proprietors should have equal facility and advantage in reaching its shore for purposes of commerce.

Halleck, volume 1, chapter 6, page 146, says:

"Where a navigable river forms the boundary of coterminous States the middle of the channel, the *filum aquæ* or *thalweg* is generally taken as the line of their separation, *the presumption of law being that the right of navigation is common to them both.*"

So Sir Shirston Baker, page 68, No. 23, says:

"Where a navigable river forms the boundary of coterminous States the middle of the channel, the *filum aquæ* or *thalweg* is generally taken as the line of their separation, *the presumption of law being that the right of navigation is common to them both.*"

Edward Creecy says, on page 221, No. 230:

"Where a navigable river forms the boundary of coterminous States the middle of the navigable channel, the

lweg, is generally taken as the line of their separation, *the sumption of navigation is given to them both.*"

Indeed, all of the authorities, most of which we have quoted our former brief, give as a reason why the *thalweg* or deep annel, is given as the boundary in rivers, that justice would quire that each riparian proprietor should have the best eans of access, and navigation, to her bank or shore of the er.

We can therefore see no reason, in logic or common sense, y the same rule should not apply to the arms of the sea, ether they be straits, sounds, gulfs, bays, or other portions the sea, and your honors will find in our original brief t Halleck, in No. 25, page 145 of his work on International w, says:

"In such a case, whether the dividing water belongs enely to one State or the boundary is the middle or *thalweg*, ch party gains or loses according as the increase or deease is upon its side. The same rule applies to the gradual noval or formation of islands in the rivers or lakes which vide the sides OR IN THE SEA within the territorial limits the *ligne de respect* of a State bordering upon the ocean."

So Sir Shirston Baker in his "First Steps in International aw" says on page 68, No. 25:

"In such a case, whether the dividing water belongs enely to one State, or the boundary is the middle or *thalweg*, ch party gains or loses according as the increase or deease is upon its side. The same rule applies to the gradl removal or formation of islands in a river or lake which vides States, OR WITHIN THE SEA, within the territorial limits *ligne de respect* of a State bordering upon the ocean. *oreover a State has a certain right of pre-emption to lands rmed adjacent* to its coast, EVEN OUTSIDE OF THIS LINE OF SPECT." (Italics and capitals are our own.)

Puffendorf is quoted by Sir Travers Twiss in his "Law of ations" in paragraph 2, section 174, page 251: "Puffendorf the same effect says 'that GULFS AND CHANNELS OR ARMS

OF THE SEA, are according to the regular course, supposed to belong to the people with whose lands they are encompassed," and Sir Travers Twiss adds :

" But in case the opposite sides of a *bay or strait are inhabited by different nations*, each nation has the right to go to the central line, drawn at low-water mark "—

thus applying the old rule to bays or straits, that the boundary line should be through the middle of the bay or straits, which are parts of the sea, and in the case at bar a a part of the gulf of Mexico.

So Rivier in his " Programme de Droit de Gens," etc., says in section 14, page 46 :

" The frontiers, p. 462 frontier mountains ; actual line, rivers ; the frontier can be on one of the banks (as below in section 13) if it is the bed of the river, it is according to recent treaties, generally the *thalweg*, that is to say the deepest line according to which the thread of the water directs itself. Frontiers in the lakes, IN THE SEA " thus making the *thalweg* theory applicable to arms of the sea. (Capitals are our own.)

So De Martens in his " Droit de Gens " says, No. 39, page 134 :

" That each of the two nations is mistress of the river and the islands which are situated in the middle of the river. * * * In navigable rivers it is the current of the river which is commonly had in view in agreeing to take the middle of the boundary. * * * WHAT WE HAVE JUST SAID IN REGARD TO RIVERS AND LAKES IS EQUALLY APPLICABLE TO THE STRAITS OR GULFS OF THE SEA, especially those which do not exceed the ordinary width of rivers or double the distance that a cannon can carry."

So Pradier Fodéré, in his " Traité de Droit International," etc., says in second volume, page 202 :

" THE LAKES FORMED IN THE IMMEDIATE NEIGHBORHOOD OF THE HIGH SEA.—If the maritime water which bathes the coast is considered to belong to the riparian States *there is still greater reason that the waters which touch the sea should be*

the same, that is to say, if the lakes form in the immediate neighborhood of the sea. These lakes ought to be considered as belonging to the State or to the States in whose territory they lie, under the same conditions that the enclosed seas are all reputed as such, *and as they are generally in communication with or connected with the sea they ought* TO BE CONSIDERED UNDER THE SAME RULES AS INTERNATIONAL RIVERS." (Italics and capitals are our own.)

It will be noted that Fodéré, speaking of lakes, uses the word in the French sense, and applies it to arms of the sea, for he says that they are in communication and connected with the sea, just as Lake Borgne is in this case.

Thus we have shown that these six eminent writers on international law, viz., Halleck, Baker, Twiss, Rivier, De Martens, and Pradier Fodéré, all apply the thalweg theory to rivers, and equally to arms, bays and gulfs of the sea, and in our original brief we have shown on pages 91 *et seq.* that the King of the Netherlands, as arbitrator on our northeastern boundary, applied it to the bays of Fundy and Chaleurs, that Emperor William applied it to the San Juan de Fuca straits, and that the Alaskan boundary arbitration applied it to the Portland canal. Counsel for Mississippi admitted in argument that the Portland canal was an arm of the sea from two and a half to five miles in width, and in Devoe Manufacturing Co., 108 U. S., 401, this honorable court applied the rule to the bay of New York which in some places is ten miles wide. Why then should not the same rule be applied to this narrow strip of water on Lake Borgne and Mississippi sound, where it is only eight or nine miles wide, and why should the inhabitants of Louisiana, if Louisiana was a foreign state or nation, be deprived of that deep-water channel, and be prevented from shipping their lumber, pine products, fruit and other products out to foreign ports through that channel, into the sea or gulf of Mexico.

Mr. Taylor claimed in his oral argument, that this principle of international law, in regard to the thalweg, would not

apply in this case, as it did not apply to other bodies of waters than rivers or lakes. This point we have already argued in this brief, and confidently believe that we have shown that it would apply. He said further that even if the principle would apply to arms of the sea, or the sea, in general cases, it could not apply here, because where there was a special convention or provision, that international law rules would not apply at all in any respect; and that as the act of Congress had laid down a specific boundary, which he called a *land or coast boundary*, in this case, the general principles of international law would not apply. His error consists in saying that there is any land boundary laid down in the act of Congress in the disputed territory. On the contrary it is a *water* boundary, in the words "thence to the gulf of Mexico" and the question here at issue is where is the boundary line in this sheet of water, and therefore it is necessary to resort to the principles of international law to fix where in this Gulf, or its arms, the line should run.

Against all of these authorities which we have collated, counsel for Mississippi neither cite nor quote any authority to the contrary except that, on page 18 of the brief of associate counsel, they say:

"While admitting the application of the doctrine Lord Chief Justice Alverstone was careful to limit it. In replying to Mr. Taylor he said: 'The doctrine of the thalweg applies, but I am bound to say I do not think that even David Dudley Field himself—and Dudley Field was a very great authority, meant to say what you put upon him, because he refers to Bluntschli, *who is there dealing with rivers.*'"

This passing remark of Lord Chief Justice Alverstone, sitting upon the board of arbitration, without argument and without prior and particular research on the question as to the application of the *thalweg*, or deep channel, theory to arms of the sea is the only authority that our opponents have advanced in opposition to the authorities which we have already quoted. It was not necessary, perhaps, for the pur-

ose of the argument before that arbitration commission, to rgue the proposition in regard to arms of the sea or the pen sea, but it is probable that, had the chief justice been onfronted with the authorities which we have now adduced, nd the question properly presented and argued, that he ould have been of the opinion that the principle did apply s well to arms of the sea, sounds, bays, gulfs, and inlets, as does to interior rivers.

And in order to oppose the thalweg or deep channel heory, Mississippi now changes base, and calls the Mississippi sound and Lake Borgne the open sea.

It says in the following paragraphs of its cross-bill (Record, page 85, paragraph VII):

"That the State of Louisiana claims title and sovereignty ver some of the islands belonging to the State of Mississippi by virtue of certain alleged action of certain officers f the United States Government and local officers of the tate of Louisiana, recited in the original bill of complaint erein; your orator charges that said claim to said islands nd territory is not well founded because of the matters erein set forth and because said islands and territory have ot been susceptible to actual use and occupation and because the said claim is in violation of sec. 3, art. IV of the onstitution of the United States prohibiting the transfer f any part of the territory of one State to another adjaent State without the consent of the legislatures of the two tates and of the Congress. However, if this honorable court hould, for any cause or reason, adjudge said islands and erritory approved by the aforesaid officials to the State of ouisiana to belong to said State because of such transfers hen your orator prays that the claim and title of Louisiana hereto be restricted to the real lands or islands so lost to the tate of Mississippi, and be in no case permitted to affect ny lands under the waters, or any of the public oyster eefs thereunder. Your orator alleges and charges that she as exercised sovereignty and jurisdiction over said waters ithin eighteen miles of her shore aforesaid, and that her itizens have enjoyed the same for all lawful purposes since er admission into the Union; that, by her public statutes, odified by authority of her legislature in 1857, she declared

in terms what had hitherto been in fact the southern or water boundaries of her coast counties in art. 2, sec. 2, page 50, Code of 1857; as follows * * * 'and the counties bordering on the gulf of Mexico—to-wit: Jackson, Harrison and Hancock—shall, respectively, have and possess jurisdiction and extend to the southern boundary of the State, within the space embraced, by extending their boundary lines which strike *the gulf of Mexico*, or the inlets thereto, on a continuous direct course *to the southern boundary of the State, including all islands that may lay within the limits thus defined.*'

(Italics ours.)

"By which legislation above referred to, and all other legislation by the Congress and the said State of Mississippi, the '*Mississippi sound*' *was recognized as a body of water, six leagues wide, wholly within the State of Mississippi, from Lake Borgne to the Alabama line, separate and distinct from 'the gulf of Mexico.'*"

Record, page 87, cross-bill, art. IX.

"Your orater alleges and charges that all of the Mississippi territory between Pearl river and the Alabama line was organized on December 14, 1812, into two counties, known as Hancock and Jackson, and that on February 5, 1841, the county of Harrison was organized between the bay of St. Louis and the bay of Biloxi by the segregation of parts of Hancock and Jackson counties. Your orator shows that in an official codification of the statute laws of the State of Mississippi the southern boundaries of said three coast counties are described as follows: Section 44 of the Revised Code of Mississippi of 1880 as to Hancock county says: '* * * thence along the middle of said bay of St. Louis, southwardly to its entrance, thence due south to the southern boundary of the State of Mississippi, *in the gulf of Mexico;* thence westwardly, with said boundary, including all islands within six leagues of the *shores of the gulf of Mexico and Lake Borgne*, to the most eastern junction of Pearl river, and *Lake Borgne*, and to the east mouth of Pearl river; thence up said river, by the middle thereof, to the point of beginning.' (Italics ours.)

"Section 45 of the Code above mentioned describes the southern boundary of Harrison county to the middle of the

bay of Biloxi, and proceeds as follows: '* * * thence along the middle of the said bay of Biloxi to its entrance, at the east end of Deer island; thence due south to the southern boundary of the State of Mississippi; *on the gulf of Mexico;* thence westwardly, along said boundary, to a point from which a line due north strikes the middle of the bay of St. Louis; thence due north to the entrance of said bay including all the islands within six leagues *of the shore of the gulf of Mexico.*' (Italics ours.)

"Section 50 of the Code aforesaid, as to the east and southern boundary line of Jackson county, reads: '* * * thence east, on the line between townships one and two, south, to the State boundary between Alabama and Mississippi; thence southerly, on said boundary *to the gulf of Mexico;* thence westwardly with said boundary to the center of range 9, west; thence north *with section lines* to the beginning.'" (Italics ours.)

"Your orator alleges and shows that in an official codification of her statute laws, taking effect Nov. 1, 1892, and by sections 368, 369 and 374 of said Code, the boundaries of said counties are the same as given in the Code of 1880 above mentioned. Your orator now alleges and charges that the lines, constituting the southern boundaries of the counties aforesaid, in the waters of the gulf of Mexico, are and have been since the formation of Hancock and Jackson counties on Dec. 14, 1812, the consistently and uninterruptedly recognized, fixed, and established, southern boundary of the Mississippi Territory and of the State of Mississippi, up to the time of the controversy referred to in the original bill in this cause of January, 1901, and out of which this litigation grew. That during all of this time the government of the Mississippi Territory and that of the State of Mississippi has exercised all and complete *jurisdiction and sovereignty over the waters in the 'Mississippi sound' as a part of the counties aforesaid.* Your orator shows that the said Mississippi authorities have recognized the 'Mississippi sound' as a part of the Territory of Mississippi, and that her township and section lines are as well established in the waters of the 'Mississippi sound' as indicated by the county boundary aforesaid, as upon the lands within said Territory. That the fishermen of all kinds have been taking fish and oysters in said 'Mississippi sound' during all of this long period, and have been governed, as well as all others using those waters, by the laws and juris-

dictions of the Mississippi Territory and the State of Mississippi and the local authorities in said coast counties. And, your orator alleges and charges the truth to be, that there has never been any adverse claim known to her by the State of Louisiana with reference to the exercise of jurisdiction and sovereignty over those waters until the aforesaid controversy out of which this litigation arose in January, 1901.

"Your orator further shows that this said line was also recognized by the supreme court, and by the lower courts of Mississippi, and a judicial interpretation given by the said courts to the acts of Congress admitting Mississippi in the recent case of Leinhard *et al. v.* Harrison County, decided by our supreme court, January 12, 1903 (not yet reported), in which controversy the issue was as to the center of the said county, and measurements from the eighteen-mile limit in the water were held to have been correctly made."

It will be seen from these extracts from the cross-bill of the respondent, State of Mississippi, that it was claimed that "the Mississippi sound was recognized as a body of water six leagues wide wholly within the State of Mississippi from Lake Borgne to the Alabama line, separate and distinct from the gulf of Mexico." That portion of the answer was framed for the purpose of showing that the boundary line of Louisiana in the clause "to the gulf of Mexico; thence bounded by said gulf to the place of beginning, including all islands within three leagues of the coast," did not mean that the line should run eastward from the mouth of Pearl river through the gulf of Mexico, but, as respondent claimed, that the gulf of Mexico there mentioned meant the gulf of Mexico south of the parish of Saint Bernard, the open gulf, and therefore that the boundary line of Louisiana should run due south towards the open Gulf, south of the peninsula. This position was assumed in order to bolster up the claim of Mississippi to the islands east of a line drawn south from the mouth of the East Pearl river, as well as that portion of the parish of Saint Bernard which it bisected. Indeed, this contention was carried out by the Mississippi map offered in

evidence, called "Mississippi A;" but now, in order to defeat the adoption of the deep-channel or *thalweg* theory, as applied to arms of the sea, opposite counsel now claim that the sea waters, up to the mouth of the East Pearl river, are the gulf of Mexico and the open sea, and, as such, they claim that the deep-water channel or *thalweg* theory will not apply to those waters, as they are a part of the open sea. On pages 17 and 18 of their brief, associate counsel for Mississippi say:

"The moment the sea is reached or a body of water which is a part of the sea, the rule is at an end. So it is beyond all doubt that the rule invoked by complainant as to the flow of the mid-channel or thalweg of the River Iberville (now known as Manchac) to the sea through Lakes Maurepas, Pontchartrain and the Rigolets, expires by its own limitation when such mid-channel reaches Lake Borgne, which, in contemplation of the rule, is the open sea, a part of the waters of the gulf of Mexico. Certainly it was so regarded in the act of April 6, 1812, admitting Louisiana, whose terms are: 'Thence along the middle of said river and Lakes Maurepas and Pontchartrain to the gulf of Mexico. The attempt to extend the rule to the estuaries of the river into the open sea, that is into the open waters of the gulf of Mexico, cannot be supported either by reason or authority."

So also on page 19:

"Such a recognition cannot, of course, give countenance to the idea that the doctrine can be extended, *beyond the mouth of an estuary or an arm of the sea*, into the open sea itself, where there are no banks between which channels can flow. The attempt made here by complainant, to extend the doctrine to a channel in the open sea is without precedent or reason to support."

So, in the brief of the attorney general and the assistant attorney general, on page 21, they say:

"The mouth of Pontchartrain was the eastern extremity on that line of the island of New Orleans. That lake was regarded as emptying into the gulf of Mexico at that point."

And so again, on page 22:

"In all these descriptions Pontchartrain opens into the Gulf."

And so again, on page 28:

"Nothing is mentioned between Pontchartrain and the Gulf, although there are two routes some distance apart, and nine or ten miles long, Chef Menteur, and the Rigolets, from Pontchartrain to the Gulf. The map taken for a guide, if any, showed an open, easy connection between Pontchartrain and the next waters, which required no description."

And again, on page 29:

"Again no map can be elected which does not make Pontchartrain open easily into the Gulf. The description stops at the mouth of Pontchartrain and calls those waters the gulf of Mexico."

And again, on page 31:

"In the second place, Ellicott allows a large, free opening from Lake Pontchartrain to the open sea. It does not show the Rigolets, but places the waters of the Gulf next after Pontchartrain going east."

Again, on page 32:

"And if under any view of the case, our conclusion above stated should not be accepted by the court, there remains only an alternative, to wit: the conclusion that the framers of the act used Ellicott's map for a guide. That is the only map which ignores Lake Borgne and the Rigolets, gives Pontchartrain a wide opening into the waters immediately east, and calls these waters the gulf of Mexico; and is the only one which combines all these said peculiar features with a doubtful connection of the Mississippi with Maurepas."

Now it becomes evident that, having abandoned their original pretext, contained in their answer, that the gulf of Mexico, alluded to in the boundary of Louisiana, is not that

part of the gulf of Mexico which is at the mouth of the East Pearl river, and of which Mississippi sound is a part, for the sole purpose of defeating the application of the deep-water channel or *thalweg* theory, and having now admitted that the gulf of Mexico alluded to in the boundary of Louisiana, as being next to the mouth of East Pearl river, is the gulf of Mexico, the open sea through which the boundary runs, they thus admit that the boundary should run through the gulf of Mexico eastward through Lake Borgne and Mississippi sound or what they now call the open sea.

This strip of water, part of Lake Borgne and Mississippi sound, is not an open sea, as contended by associate counsel for Mississippi, but a very shallow arm of the sea, so shallow as to be almost, as the associate counsel of Mississippi described it, "*as only knee deep at tip toe and only eight miles wide*," that is, outside of the deep-water channel. While this is somewhat exaggerated, yet the depth of water throughout this whole body of water is about five feet, on the average, and the channel from ten to twelve feet in depth and less than a quarter of a mile in width.

This, *ex necessitate*, compels the abandonment of their former theory, and their red-line map, extending the Louisiana and Mississippi boundary due south for eighteen miles, from the mouth of the East Pearl river, falls to the ground and is out of the case. Thus this iridescent, school-boy soap-bubble is punctured and collapses by their own admissions and arguments, and figures no longer in the case.

VIII.

Counsel for the State of Mississippi have evidently been much impressed with the argument made by the State of Louisiana that her title to the lands, which the latter claims to belong to her, as a part of the territory of Saint Bernard, has been recognized by the Land Department of the General Government, for they have made an attempt to over-

throw the strength of the position which Louisiana claims she occupies by reason of the recognition thus referred to, by contending, in their brief, that the *lands* composing the parish of Saint Bernard, and which the State of Louisiana acquired from the General Government under the swamp-land act of March 2, 1849, were not lands intended to be disposed of under the terms of that act of the Congress of the United States. The argument is made that the Secretary of the Interior exceeded his authority, and lacked jurisdiction over the subject-matter, when he recognized Louisiana's title to these lands in the parish of Saint Bernard, under the swamp-land act of 1849, by issuing to Louisiana patents to the same. We confess that we are at a loss to understand the argument, thus made, that the Secretary of the Interior and the other officers of the Land Department at the Federal capital, had no jurisdiction in respect to the conveyance to the State of Louisiana of the lands to which she was entitled under the swamp-land act of 1849, as it was made the duty of the Department of the Interior to have all lands of a "swampy and overflowed" character surveyed, subdivided into townships, ranges and sections, and when selected by the State to patent the same to the latter. We repeat, therefore, that we are at a loss to undestand wherein the Land Department of the General Government lacked jurisdiction to carry out the terms of the act of Congress of March 2, 1849. The reason for an attempt being made to show a want of jurisdiction in the Department of the Interior, in respect to these lands, is found in the fact that if jurisdiction be conceded, counsel for the State of Mississippi find themselves confronted by a long line of authorities which hold that the action of the Federal Land Department concerning the character of the lands which it undertakes to dispose of, is conclusive. When the State of Louisiana acquired from the General Government the lands of a "swampy and overflowed" character under the swamp-

land act of 1849, and which composed the parish of Saint Bernard, she derived an indefeasible title from the General Government which, by the various acts of transfer represented by patents issued, the Land Department recognized the State of Louisiana to be entitled to under that act. The Department of the Interior had jurisdiction in the matter, and when it declared, by the issuance of patents, that the State of Louisiana was entitled to what is now the parish of Saint Bernard under the terms of the swamp-land act of March 2, 1849, that department went on record as declaring that that area was lands of a "swampy and overflowed character," and its decision in that matter was conclusive. In Heath *vs.* Wallace, 138 U. S., page 573, this court held that:

"The question whether or not lands returned as subject to periodical overflow 'are swamp and overflowed lands' is a question of fact properly determinable by the Land Department, whose decisions, on matters of fact, within its jurisdiction, are, in the absence of fraud or imposition, conclusive and binding on the courts of the country, and not subject to review here."

And at page 585 this court said:

"It is settled by an unbroken line of decisions by this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction, are, in the absence of fraud or imposition, conclusive and binding upon the courts of the country." (Citing Johnson *vs.* Towsley, 13 Wall., 72; Smelting Company *vs.* Kent, 104 U. S., 636; Steel *vs.* Smelting Company, 106 U. S., 447; United States *vs.* Minor, 114 U. S., 233.)

The court made further announcement that:

"We are of the opinion, therefore, that the decision of the Land Department on the question of the actual physical character of certain lands is not subject to review by the courts." (See also Barden *vs.* Northern Pacific R. R., 154 U. S., pp. 329–330; Shaw *vs.* Kellogg, 170 U. S., 340–343; United States *vs.* Northern Pacific R. R. Co., 177 U. S., 435.)

It has also been held that—

"A decision by the register of the local land office that a particular tract is desert land, so as to be subject to purchase under the desert land act of March 3, 1877, is not reviewable by the courts, in the absence of fraud" (85 Fed. Rep., p. 333).

In that case, at page 336, it is said, after referring to the evidence submitted to the Land Department in respect to the character of certain land:

"It was upon this evidence that the Land Office Department determined that this tract of land was subject to entry under the desert land act. This was in the nature of an adjudication by the proper department of the Government; and without a direct impeachment for fraud of this determination by the department the ascertainment is final and conclusive upon the courts."

Again, in United States *vs.* Budd, 144 U. S., at page 167, this court said:

"But after all, the question is not so much one of law for the courts after the issue of patent, as of fact, in the first instance, for the determination of the land officers. The courts do not revise their determination upon a mere question of fact. In the absence of fraud or some other element to invoke the jurisdiction and powers of a court of equity, the determination of the land officers as to the fact whether the given contract is fit for cultivation, is conclusive."

In French *vs.* Fyan, *et al.*, 93 U. S., 169, it was held that:

"The act of September 28, 1850 (9 Stats., 519) granting swamp lands, makes it the duty of the Secretary of the Interior to identify them, make lists thereof, and cause patents to be issued therefore. Held that a patent so issued cannot be impeached in an action at law, by showing that the land which it conveys was not in fact swamp and overflowed land."

The case of Scott *vs.* Lockey Ind. Co., *et al.*, 60 Fed. Rep., p. 36, absolutely disposes of the argument of op-

posite counsel that no title passed to the land given to the State at the time the Department of the Interior caused patents to be issued to the State of Louisiana, for it was there said :

" In the case of French *v.* Fyan, 93 U. S., 169, the Supreme Court held that the Land Department had the right to determine whether or not land was swamp land. This case should be distinguished from a case where land is absolutely reserved from entry and sale, such as land included in the military reservations. Then there is no jurisdiction in the Land Department to make a sale or conveyance of the same. But when an application is made to enter a certain piece of land, which is not specially reserved from sale by a definite description, and the application is made to enter it as agricultural land, then the Land Department must, of a necessity, determine whether or not it is agricultural land, etc."

While on this same subject, associate counsel for the State of Mississippi make the singular argument, found at page 75 of their brief, when referring to the claim of the State of Louisiana that her title to the lands in Saint Bernard had been recognized by the Land Department at Washington, that " this aspect of the case is not worthy of serious consideration, save so far as it goes to show that the authorities of Louisiana by seeking to acquire color of title to the islands in question by an appeal to the swamp and overflowed land acts were convinced that that State possessed no title to them under the act of April 6, 1812, admitting her into the Union."

This is the most singular argument that we find, among the many strange and peculiar ones, urged in the brief prepared by associate counsel for defendant. The attempt is made, in using the language just quoted, to have it appear that the State of Louisiana, by applying to the General Land Department at Washington for the lands composing the parish of Saint Bernard, under the terms of the swamp land act of 1849, had practically admitted that these lands had not previously been included within the boundary line

of Louisiana, and that, by making application to the Land Department for these lands, she had recognized that she had no right to claim them as being within her boundary under the act of April 6, 1812. Louisiana has at no time claimed that she had *title* to these land until after they had been patented to her under the terms of the swamp land act of 1849, her whole contention being that the same were included within the boundary limits fixed by the act of Congress, admitting her into the Union in 1812. All of these lands, which were of a swampy and overflowed character, had been reserved to the General Government by the enabling act of the Congress of the United States, approved February 20, 1811, entitled:

"An act to enable the people of the Territory of Orleans to form a constitution and State government and for the admission of such State into the Union on an equal footing with the original States, and for other purposes."

By an examination of section 3 of that act, this court will find that it was expressly declared by the Congress of the United States that the people inhabiting all that territory or country ceded under the name of Louisiana by the treaty made at Paris on the 30th day of April, 1803, should, as a condition precedent to their being admitted into the Union as a State, "agree and declare that they forever disclaim all right or title to the *waste and unappropriated* lands lying within the said territory, and that the same shall be and remain at the sole and entire disposal of the United States."

IX.

In his oral argument before this honorable court, Dr. Taylor, the able international jurisconsult, laid down the proposition of international law that the deep-water sailing channel line, through *Mississippi sound*, could not be adopted as the true boundary between the two States in those waters, because such waters were the open sea or gulf of Mexico, or

the high seas; and that if the navies of France and England were to engage in battle there, that no complaint could be made by the Secretary of State of the United States Government because the rights of a neutral government would not have been violated. He makes this statement and yet, in the same breath, says these waters belong to the State of Mississippi, because they are wholly within the domains of that State, a conclusion that would be absolutely at variance with the first proposition. Now the truth is that these waters are wholly within the United States, and belong part to Louisiana and part to Mississippi; that they are inland waters, an inclosed arm of the sea; and the navies of foreign countries could not engage in battle there because there is no opening from this body of water, this Mississippi sound, into the gulf of Mexico, that is six miles wide; and therefore being an estuary, or inland arm of the sea, wholly within the United States, all rules of international law do apply in the fixing of a water boundary such as this, where there is any doubt or confusion in the boundaries given in the acts of Congress creating the two States. The openings above referred to are those between Cat island and Isle à Pitre; between Cat and Ship islands; between Ship and Horn islands; between Horn and Petit Bois islands; between Petit Bois and Dauphin islands and between Dauphin island and the mainland on the west coast of Mobile bay in Alabama. Not one of these openings into the gulf of Mexico or sea is six miles wide, thus making the waters of Mississippi sound, inland waters, an arm of the sea, entirely within the United States.

X.

The attention of the court is called to the fact that the State of Louisiana has United States Government title to Grand or Half Moon island, and Isle à Pitre, islands at different points and immediately to the south of this deep-

water sailing channel boundary, while the State of Mississippi has United States Government title to Cat island and Saint Joseph island, islands at different points immediately to the mouth of this deep-water sailing channel boundary, thus indicating that the two States recognize it in fact as the true boundary.

XI.

The assistant counsel for Mississippi Mr. Flowers, the assistant attorney general of Mississippi attempts in his oral argument as well as in his brief to show, that the Louisiana purchase did not convey any land or territory east of the Mississippi, other than the island of Orleans. The fallacy of this argument is transparent.

There are four distinct reasons why his theory of the Louisiana purchase not including any territory east of the island of Orleans cannot prevail:

1st. If it be true, that the Mississippi line extends to the Lake of the Mounds, as the 6 league limit, that part of Saint Bernard parish lying south of that point, would belong to no State at all.

2d. If it be true, then Louisiana would have no boundary on the gulf of Mexico to the northeast as the act of Congress provides, but its boundary here would be a land boundary adjoining Mississippi's line at the Lake of the Mounds.

3d. It would utterly negative Mr. Jefferson's memoranda, on which Congress is presumed to have acted, that Saint Bernard extended 18 leagues or 54 miles to the eastward from the Mississippi river.

4th. That his theory would negative the American claim that the Louisiana purchase extended along the coast as far as Mobile, and the Perdido river, which claim is supported in 2d Peters, 253, in an able opinion by Marshall, C. J., which

repudiates the present theory of the attorney general of Mississippi.

XII.

The counsel for Mississippi have vainly attempted to reconcile and explain away the clash, conflict, and repugnancy between the acts admitting Louisiana and Mississippi into the Union, in so far as the adjacent islands are concerned. We have shown already that their theories are baseless. But there is one and only one way of reconciling the difference, and that is if we assume that Congress when it passed the Mississippi act was fully conversant with the topography and geography of this portion of the country, it did not intend to include in the grant of the islands within six leagues of the Mississippi shore in 1817, the islands already granted to Louisiana in 1812, but the islands it intended to grant to Mississippi were only those east of the Saint Bernard peninsula, such as Cat, Ship, Horn and Petit Bois islands. This is the only theory which can make the action of Congress consistent in the two acts, on the presumption that it was fully advised of what it was doing.

XIII.—Prescription and Acquiescence.

On pages 23, 24, and 25 of the brief of the attorney general and assistant attorney general of Mississippi there appear citations from the testimony of a formidable array of witnesses who swear that they had always heard and understood from their forebears that the territory in dispute here belonged to Mississippi. Of these twenty-four (24) witnesses fifteen are oyster fishermen who acknowledge that they are engaged in the business of fishing oysters from the disputed territory, and are therefore interested in retaining their livelihood in the Louisiana marshes. These are Clements, the two Fountains, Moran, Tiblier, Lanius, Williams, Anglada, Matthieu, Ryan, the two Beaugezes, Ladner,

Eleuterius, and Lizana. Besides their evident controlling interest in testifying as they did, the frailty of fishermen's testimony has almost become a proverb. Indeed the denial of the Saviour by St. Peter, has been by some attributed to his falling back into his old habit as a fisherman. Of the other witnesses N. Desporte is a dealer in oysters taken from the disputed territory, and Ernest Desporte is his brother. Frear is also a similar dealer; Lizana is an oyster inspector, thus making nineteen of the twenty-four witnesses directly interested in coloring their testimony to suit their interests. And a close inspection of their evidence will show that nearly all of it is given in a stereotyped manner. Of the testimony of the other five witnesses, it is plain that the loss of the right to fish oysters from this territory would materially affect the interests which they possess in the town of Biloxi, which relies in large part on its canning industry and oyster trade for its prosperity. *Per contra*, Governor Heard of Louisiana testified on page 91, Record, that Mr. McDonald, the mayor or ex-mayor of Pass Christian, Mississippi, pointed out to him, Governor Heard, the deep-water channel as the boundary line between Louisiana and Mississippi. Again Mr. E. E. O'Brien, a witness for respondent, mayor of the town of Bay St. Louis, Hancock county, Miss., the county immediately north of the disputed territory, says on page 1661 of the record that the territory has always been called the Louisiana marsh, "but I know since my boyhood I never have known of the place or ever heard of it as anything else except the Louisiana marsh. Q. Was it not the common expression among all of the fishermen, and the people generally that that territory is the Louisiana marsh? A. I have always heard it so mentioned."

And on page 1663:

"Q. Did you understand by that that it belongs to the State of Louisiana, because it is called Louisiana marsh? A. Well my impression would be that way if it is called Louisi-

ana marsh, there must be some reason for giving it that name. Probably they thought it was a portion of Louisiana and extended it on that way to keep it up."

So again Mr. Samuel F. Heaslip, who testifies that he lived in Pass Christian, Mississippi, from the time he was three years old, that is from 1851 to 1866, and again from about 1874 to 1896, that he was at one time quartermaster general of Mississippi, justice of the peace and mayor of the town of Pass Christian:

"Well I have always known it and heard it spoken of as the Louisiana marshes. * * * I never heard them spoken of or referred to except simply as the Louisiana marshes."

He was asked:

"Q. You have heard the fishermen along that coast speak of the territory. A. I would not confine it to the fishermen alone that I heard refer to it."

He says that he visited it from the time he was a boy of 8 or 9 years, and has visited it "I suppose a couple of hundred times or more" (Record, pages 841, 842).

Captain Cowand (page 553), a Mississippian by birth, 65 years of age and partly resident in Mississippi, says:

"In this area here, what is called the Louisiana marshes."

This testimony is confirmed by ten witnesses for Louisiana mentioned on page 111 of our original brief, all of whom have been frequent visitors during the summer on the Mississippi gulf coast—John M. Parker, Alex. Brewster, Emile J. O'Brien, Thomas J. Barr, Associate Justice F. A. Monroe of the supreme court of Louisiana, Capt. Steve Maloche, Judge Lawrence O'Donnell, Oswald Ogden, Dr. Joseph T. Scott, Louis H. Fairchild, Mr. E. H. Farrar and Louis Cucullu, president of People's bank, all gentlemen of the highest respectability and standing, and who have no interest direct or indirect in this controversy.

XIV.

The True Character of the Area in Dispute.

The fact that both sides admit that the area in dispute has been called the Louisiana *marshes* since time immemorial shows that it had this indeterminate character and that it was never regarded as an archipelago of islands. It was only the eastern extremity of this marshy peninsula that had an individual name, that is Isle à Pitre. The small divided sections of the *marshes*, other than Isle à Pitre had no individuality. Quite to the contrary were the conditions existing in regard to the chain of islands forming the southern limits of Mississippi sound, such as Dauphin, Petit Bois, Horn, Ship, and Cat islands, which were distinctly named and appear so designated on the earliest maps of this region. This is but natural because in the very earliest history of this section of the country one of the first settlements was made on Dauphin island, also known from an incident in the early history there as *Massacre island.* Travel to the westward, towards New Orleans, was then made by the inside route, inside of this string of the above-named islands, and New Orleans was reached by the back way through Lake Borgne by Bayou Bienvenu and through Lake Pontchartrain by Bayou St. John. To the people that traveled that route these white sea-sand islands with their pine trees were distinct and well known while the marshes, west of Cat island were given no individuality except to designate them by this generic name.

The impression that assistant counsel for Mississippi try to create in the mind of the court, on page 45 of their brief, that Petit pass, Raccoon island, Little Raccoon island, Crooked island, Mud Cross island, Pirate Point island, Nigger island, Dead Man's island, Shell island, Brush island, Mink island, Wild Goose island, Elephant Point island, Sundown island and Door Point island *were as well known in the past as Cat*

island is absolutely without warrant in the record and the idea is nothing but the creature of their fertile imagination, an imagination that has been even strained in its creative faculty in a desperate effort to bolster up a desperate case. The truth is that prior to the survey made in 1846 by the United States, all the maps show the area to be a part of the *peninsula* of St. Bernard. These bodies of land had no separate identity prior to that date. The official map of Saint Bernard parish is made up from these United States records, and according to that map, in this broad expanse of marshes, but few parts are given individual names, to-wit: Preachers isle, Fly Town island, Turtle or Pen island, and Martin island.

Where then did associate counsel for Mississippi get the names of these islands, which names appear on their map Mississippi Exhibit "A"?

The answer is readily forthcoming—the information did not come from tradition brought down by the testimony of witnesses nor dug up from the past in ancient maps. The information came from the map of the area made in the year 1898, just four years before the institution of this suit, which map was made by Lieutenant Swift and Dr. Moore of the United States Fish Commission, who were in the disputed area on an oyster investigation in February, 1898, and in making their map gave the names of these islands as they were then known in the year 1898. This is shown clearly and conclusively by a comparison of the map Mississippi "A" (Record, page 88) with the Fish Commission map (Record, p. 6, diagram No. 4), and in transferring the names they have even made the mistake of calling *Mud Grass island* Mud *Cross* island. This island appears a little to the left and below the center of the disputed area in the marsh proper as shown on these maps. The names of the bodies of water given on map Mississippi "A" follow the names given on the Fish Commission map made in the year 1898 and are names entirely

different from those given on the United States surveys For instance, a body of water is called " False Month Bay " and " Nine Mile Bay " on the two former maps and the same body of water is called Bay Boudreau on the United States map (Record, page 1047, f 43, plat of T. 12 S., R. 18 E., " Lakes of Bay Boudreau ") and on the Saint Bernard official map (Brief, page 106) " Bay Boudreau."

Before the Fish Commission survey of 1898, such islands as Racoon island, Little Racoon island, Crooked island, Mud Grass island, Nigger island, Dead Man's island, Shell island, Brush island, Mink island, Wild Goose island, Elephant Point island, Sundown island and Door Point island, of those mentioned by Mississippi's counsel and which are in truth mere *marsh hummocks* had not attained the dignity of enjoying individual names.

The very first *island* mentioned by counsel for Mississippi is *Petit Pass island.* Let us see what tradition shows in regard to this island which lies just off Malhereux point on map Mississippi "A," at the middle of the extreme left of this map. It will be noted that it is separated from the main body of the marsh by the strait of water called " Le Petit Pass," and must have come into existence as an island when the strait Le Petit pass was made. Mr. A. S. Cowand, a Mississippian by birth, testified (Record, page 547) to a conversation he had had, in the year 1858, with a man who then was, and whose father before him had been, the light-house keeper at *Cat island.* They were discussing the changes that had occurred in the marshes.

Mr. Cowand was asked :

" Q. What was the tradition in regard to this Petit pass ? "

And answered as follows, referring to his conversation with the Cat Island light-house keeper :

"A. Well, as I was telling you, we were speaking about how the islands were being washed away and disappearing and we were speaking about that country, Half Moon island

especially because I had been there to Half Moon island just before that; he said, Well *I recollect when there was no cut through Petit pass at all, it was the main land all through there.*"

In other words, here is a witness who testifies to a conversation with this light-house keeper within whose lifetime this Petit Pass island came into existence by being separated from the main body of the marsh land. How absurd therefore does the idea prove itself that the Congress of the United States had these marsh islands in mind when it created the State of Mississippi.

XV.

We understand that associate counsel for Mississippi made the statement in oral argument that it was a matter of frequent occurrence for steamboats to go through the marshes. We can hardly credit that they were fully informed of the evidence in the record, if we are correct in understanding them to make this statement.

The only man that ever took a steamboat through a part of the Louisiana marsh, so far as the record shows, was Mr. John Walker, a Mississippi witness, who testified as follows on direct examination:

"Q. Do you know anything about this country that we call the Louisiana marshes?

"A. I know the coast only. I don't know anything about the inside. Not through the marshes, but I am familiar with the coast line.

Q. Are you familiar with the line from Malheureux point to Isle à Pitre?

"A. Yes sir, all the way around from the mouth of the Mississippi river, and from the passes of the river all the way around to Lake Maurepas, *excepting as I say that I have never been in the marsh, except that I have been through Three Mile bayou,* and *once* in the entrance of Nine Mile bayou from the eastward.

"Q. What craft did you have in going through Three Mile bayou?

"A. I had a small steamboat.

"Q. How much did she draw?

"A. Well she only drew about four feet, but I found seven feet of water in there.

"Q. You found seven feet of water where?

"A. *In the entrance.*" (Italics ours.)

Record, page 1271.

And again this witness says (pages 1296 and 1297 of record):

"Q. I understood you to say awhile ago that you had perhaps made two hundred trips between the mouth of Pearl river and Chandeleur sound?

"A. Yes sir. In the 27 years I was there.

"Q. And out of these 200 trips it was only on that one occasion that you went through there?"

Counsel by the word "*there*" was referring to the Louisiana marshes.

The witness then answered:

"A. Only one occasion.

"Q. Through the Louisiana marshes by this route that you have just described?

"A. Yes sir.

"Q. You never went before?

"A. No sir.

"Q. And you have never been through there since?

"A. No sir.

"Q. This route that you have described certainly was not an ordinary route was it. The customary route for people to take?

"A. I was a licensed pilot at the time I was taken through there. It was a route I had never seen or known, and knew nothing about."

The route here referred to was into the Louisiana marshes through Three-mile bayou. The record teems with evidence that Nine-mile bayou claimed by Mississippi to be

Louisiana's eastern boundary was even less well known by Mississippians. To say therefore that steamboats plied through the marshes is an absurdity.

XVI.

We think that after a careful examination of the record in this case, your honors must inevitably come to the conclusion, that Mississippi's claim to the territory in dispute, is of very recent origin. The record teems with evidence that in bygone years the whole Mississippi coast was fringed with valuable oyster reefs and natural beds from the Pearl river to the Alabama line; that although the State of Mississippi passed in 1843 and 1857, and at other dates, some legislation for the protection of its oysters, it was desultory and inefficient and that even these laws were not enforced; that there were no laws to prevent fishing these beds during the spawning season, that is no closed season; no laws to compel culling the young oysters off of the adult oysters; no law to prevent scooping and dredging; that in spite of these inroads which nearly exhausted them, yet the fecundity of the oyster prevented the entire destruction and annihilation of these Mississippi oyster beds. This was until the year 1880, when the first oyster cannery was established on her coast, and it was only after that date, when numerous other large canneries were established, that the enormous demands for oysters for these canneries led to the utter annihilation and destruction of her own oyster beds. It was then in the eighties that the Mississippi fishermen, having exhausted their own oyster beds, invaded the Louisiana territory here in dispute to get their supply of oysters for the Mississippi canneries. The enormous demand which was created by the needs of these canneries, and oyster dealers is well shown by the testimony of one of these canners, a Mississippi witness (Heidenheim, pages 1707 and 1708) when he states that the oyster industries of the Mississippi coast amount to a business of one hundred millions of dollars ($100,000,000). That this Mississippi claim to this disputed territory did not

arise until after this great demand of oysters for the Mississippi canneries is shown by the testimony of some of Mississippi's own witnesses. One of them, L. Fovard (p. 1481, Record), having mentioned places in the disputed territory was asked: "Q. How long has it been your understanding that these places you have mentioned are in the State of Mississippi? A. *About twelve years.*" The italics are our own and show that this witness never had heard of Mississippi's claim until about 1892 although he had for several years before been fishing in the disputed territory. On page 1499 of the record Champlin, a Mississippi witness, testifies that he never heard the matter discussed until 1888. Another Mississippi witness (Bosarge, Record, page 1520), who had been an oyster fisherman for thirty years, says:

"Q. How did you come to know about Mississippi claiming six leagues or 18 miles south of the Mississippi shore? A. When this law came up in 1893, I think it was. Q. You never knew anything about it until 1893? A. No, sir, I never knew anything about the 18 miles until then."

So another Mississippi witness, Cavatochotch (Record, page 1541), testifies that Louisiana and Saint Bernard parish claimed the territory for twenty years back. So McCaleb, another Mississippi witness (on page 1552), testifies that he heard the territory called generally the Louisiana marsh long before this controversy arose. So another Mississippi witness, Patenotte (Record, page 1577), says that it was only in 1903 that he heard of Mississippi's claim to this disputed territory. We might cite and quote from almost any number of Mississippi witnesses' testimony to the same effect, but do not care to burden this brief further with citations and quotations. As to the waste and annihilation of the oyster reefs and beds of Mississippi, we specially invite the attention of the court to Captain Cowand's testimony. Captain Cowand is a skilled oyster culturist, who has devoted his life to the business of the oyster industry and has written a great deal on the subject. He was born on this coast, and lived there all his life, until

quite recently when he moved to Louisiana. His knowledge of the disputed area is probably more profound than that of any witness who testified on either side. On page 559 he (witness) gives an account of how the Mississippi oyster beds were destroyed by dredging and wastefulness between 1885 and 1890, and he says on page 560, speaking of the Mississippi fishermen: "When the oysters in Mississippi sound got so scarce they commenced going over there" (to the disputed territory), and he acknowledges that he was at that time one of the Mississippi "pirates." "That was about 1886 and 1887." (See particularly on this page a description of how the Mississippi oyster reefs were destroyed.) On page 561 of the record he says that he is financially interested on Mississippi's side, because if these Mississippi fishermen were allowed to ruin the Louisiana natural oyster fisheries in this disputed territory, as they had already ruined the Mississippi fisheries, it would benefit him as it would make oysters scarcer, and he could get better prices for his own product from his cultivated beds.

We, therefore, respectfully submit that the present claim of Mississippi is an afterthought, trumped up, to take from Louisiana valuable oyster territory, after her own citizens had ruined and annihilated her own fisheries by wanton wastefulness, and if these Mississippi natural oyster beds and reefs had been properly protected by Mississippi, she would have had now all the oysters she needed within two or three miles of her own coast, and would not have been compelled to go from Biloxi to this disputed area about thirty miles, and Mississippi would never have made her present preposterous claim to Louisiana's territory.

All of which is respectfully submitted.

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